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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09 857,796	06 11 2001	Patricia De Jong	B0-42260	9646

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EXAMINER

HENDRICKS, KEITH D

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 06/18/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/857,796

Applicant(s)

DE JONG ET AL.

Examiner

Keith Hendricks

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-13 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-13 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s) ____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 4 6) ☐ Other:

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DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-13 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

It is suggested that the claims be amended to conform to one of the statutory classes of invention, namely a "composition", versus a "preparation."

It is noted for the record that the phrase "which contains", as in claim 1, is not interpreted as closed language. The preparation simply "contains" the recited materials, thus akin to "comprising".

It is unclear in what organism, and to what effect, the phrase "health promoting action... of the digestive tract" pertains. This broad intended function does not serve to define the invention, as it does not provide clear metes and bounds for the claim.

Similarly, it is unclear in which organism(s) the oligosaccharides are to be "non-digestible", as for example, the bacteria and yeast may be able to digest the oligosaccharides, but not humans.

Regarding claims 1, 5 and 13, the phrases "in particular", "and the like", and "such as", render the claims indefinite because the claims includes elements not actually disclosed (those encompassed by these phrases), thereby rendering the scope of the claims unascertainable. Further, it is unclear whether the limitations following the phrases are part of the claimed invention. See MPEP § 2173.05(d).

In claims 3-4, 6 and 12, the phrase "chosen from ... and combinations thereof" (used herein as an example) is not in accepted U.S. patent language format. It is suggested that the claims conform to either (a) "selected from the group consisting of ... and combinations thereof", or (b) "comprising or combinations thereof." Further, this language is also suggested for claims 5 and 13.

Claim 4 appears to conflict with claim 3, in that the compounds recited in claim 3 are the starting compounds to be hydrolyzed to oligosaccharides, whereas in claim 4, the same compounds are stated to be the oligosaccharides. Clarification and correction is required.

In claim 6, the term "*Lacto-bacillus*" should be one word: *Lactobacillus*.

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Further in claim 6, the choice of microorganism is vague and indefinite. It is unclear if the choice is (a) one or more of *Lactobacillus* and one or more of *Bifidobacterium*, or (b) a *Bifidobacterium* and one or more of a *Lactobacillus*.

Also in claim 6, it is suggested that the term "wherein" be inserted at line 4, between "species and", and "the yeast".

Claim 8 lacks a clear antecedent basis for the phrase "the one or more probiotics" according to claim 1. Claim 1 requires "at least one bacterial strain and at least one yeast strain" as the probiotics, and thus there must be at least two probiotic organisms present, including one from each.

It is suggested that the ratio provided in claim 8 be amended to have the subjects correspond, in specific order, to the numbers of the ratio.

In claim 9, line 2, the term "of" is misspelled.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-13 are rejected under 35 U.S.C. 102(b) as being anticipated by Ehret (US PAT 5,700,684).

Ehret discloses a biomass composition comprising a *Saccharomyces* species of yeast, and lactic acid bacteria, including *Lactobacillus*. These microorganisms are present in a medium "obtained by a double hydrolysis of a diluted aqueous mixture comprising at least whole-flour and/or wheat germs" (col. 2), by an alpha-amylase and an amyloglucosidase. As shown in Table 1, the oligosaccharide hydrolysis products present in the medium used to maintain the yeast (and bacteria) include xylose (a hydrolysis product of xylan, in wheat), cellobiose (a disaccharide) and raffinose (a trisaccharide). Regarding instant claims 8-9, as shown in example 3 of the reference, the density of the microorganisms is in the range of 10^9 cells, while the variable saccharide levels are provided at columns 8-9. A yeast autolysate is also present in the composition (col. 8), thus meeting the limitation of instant claim 7 toward dead yeast cells. Further, a portion of the *Saccharomyces* yeast added to the medium would naturally, eventually be dead.

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Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (703) 308-2959. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9565 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

kdh
June 12, 2002


KEITH HENDRICKS
PRIMARY EXAMINER